No. 87-399

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SUPREME COURT OF VIRGINIA
and DAVID B. BEACH, Clerk,
Supreme Court of Virginia,
Appellants,

v.

MYRNA E. FRIEDMAN,
Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO AFFIRM

Cornish F. Hitchcock
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Appellee

Of Counsel:
John J. McLaughlin
313 Park Avenue, Suite 400
Falls Church, Va. 22 46
(703) 237-0125

October 1987

CASELLAS PRESS INC. — 1717 K STREET NW WASHINGTON DC 20036 — 223-1220

QUESTION PRESENTED

Did the court of appeals correctly hold that the Privileges and Immunities Clause prevents a state from waiving the bar examination requirement for experienced lawyers who live in that state, while denying that option to equally qualified lawyers solely because they live in another state?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-399

SUPREME COURT OF VIRGINIA
and DAVID B. BEACH, Clerk,
Supreme Court of Virginia,
Appellants,

v.

MYRNA E. FRIEDMAN,
Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO AFFIRM

Appellee Myrna E. Friedman respectfully moves the Court to affirm the judgment because it is manifest that the question on which the decision of the case depends is so unsubstantial as not to need further argument. The opinion below is now reported at 822 F.2d 423 (4th Cir. 1987).

STATEMENT OF THE CASE

Rule 1A:1 of the Rules of the Supreme Court of Virginia allows experienced lawyers to be admitted to the Virginia bar without first taking the bar examination, a process which will be referred to here as "motion admissions" or "admission on motion." Under this Rule, an applicant must have been licensed for five years by a jurisdiction which admits Virginia bar members on motion, must be "a permanent resident of the Commonwealth," and must intend "to practice full time as a member of the Virginia bar." Va. S. Ct. R. 1A:1(c), (d).

Ms. Friedman is an experienced lawyer who in January 1986 became assistant general counsel of a corporation based in Fairfax County, Virginia. Her job entails advising her employer on Virginia law, and she may be required to represent the company in Virginia courts. She sought admission to the Virginia bar on motion in June 1986, but her application was denied solely because she lives in Cheverly, Maryland, and thus failed to meet the residency requirement of Rule 1A:1(c) (J.S. App.A2).

On 25 September 1986, Ms. Friedman filed suit against the Supreme Court of Virginia and its clerk ("Virginia" or the "appellants") in the United States District Court for the Eastern District of Virginia. She alleged that Rule 1A:1(c) discriminated against residents of other states, in violation of the Privileges and Immunities Clause, the Equal Protection Clause, and the Commerce Clause of the United States Constitution.

On 14 November 1986, the district court heard argument on cross-motions for summary judgment and ruled from the bench that Rule 1A:1(c) violated the Privileges and Immunities Clause. In a memorandum opinion filed that day, Chief Judge Bryan stated that when an experienced applicant agrees to practice full time as a member of the Virginia bar, a residence requirement "bears no substantial relationship to the objectives advanced by the Commonwealth of Virginia, namely, proficiency in the practice of law, a commitment to that jurisdiction, and an assurance of compliance with the agreement to practice full time" (J.S. App. A15).

The Fourth Circuit affirmed on 12 June 1987 (J.S. App. A1-A14). The court rejected Virginia's threshold claim that the Privileges and Immunities Clause was inapplicable because nonresidents were not totally excluded from the Virginia bar, since they could always take the bar examination. As the court observed, the Rule on its face makes a distinction between residents and nonresidents, and the "discriminatory effect of Rule 1A:1 falls entirely on nonresidents of Virginia" (J.S. App. A7).

The court of appeals then held that the district court had correctly applied this Court's Privileges and Immunities Clause decisions in striking down the Rule. It found "no nexus beween residence and lawyer competence and Virginia points to none"(J.S. App. A13). Nor did it find any reason to think that nonresidents would honor their commitment to full-time practice any less than Virginia residents would, adding that compliance with the Rule's full-time practice requirement could be assured through less restrictive means, such as requiring motion admittees to certify annually that they comply with that rule (J.S. App. A11-A14). Rehearing was denied, and no judge requested a vote on appellants' suggestion that the case be reheard *en banc*.

ARGUMENT

THE QUESTION PRESENTED IS NOT SUBSTANTIAL.

Because the courts below correctly set aside Rule 1A:1(c) as unconstitutional discrimination, plenary review is not warranted.

1. The judgment should be summarily affirmed because this case is controlled by *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985), which held that the Privileges and Immunities Clause prevents a state from discriminating against nonresidents seeking admission to its bar. Appellants argue (at 6-9) that *Piper* is not controlling because Ms. Piper had taken the bar examination, whereas Ms. Friedman is seeking admission on motion, but that distinction is not tenable.

The argument that the Privileges and Immunities Clause does not apply is based on the fact that nonresidents are not totally barred from obtaining a license in Virginia because they can take the bar examination. This claim is plainly foreclosed by the Court's decisions in this area, many of which involved laws which did not flatly bar nonresidents from pursuing their profession, but rather subjected them to conditions not applied to state residents. *E.g., Mullaney v. Anderson,* 342 U.S. 415 (1952) (higher license fees); *Toomer v. Witsell,* 334 U.S. 385 (1948) (same); *Ward v. Maryland,* 79 U.S. (12 Wall.) 418 (1871) (permit requirements).

Rule 1A:1 offers Virginia residents a valuable benefit in the form of a "fast-track," almost risk-free way of obtaining a license without taking time away from their practice. By contrast, as the court of appeals noted, nonresidents must take the time and incur the expenses of preparing for and taking the bar examination; their admission is delayed

until after they pass that examination, "which may have a serious, albeit temporary, effect on their legal practice"; and they assume the "risk that even an experienced attorney may fail" the examination (J.S. App. A8). Because the benefits of Rule 1A:1 are offered *only* to Virginia residents, the Rule is precisely the sort of state law requiring scrutiny under the Privileges and Immunities Clause, which was intended to cure "the practice of some States denying to outlanders treatment that its citizens demanded for themselves." *Austin v. New Hampshire,* 420 U.S. 656, 660-61 (1975).

Appellants seem to be arguing that since they could make everyone take the bar examination, they enjoy total discretion to decide when and for whom that requirement will be waived. The point is answered by this Court's decisions involving unconstitutional conditions, such as *Speiser v. Randall,* 357 U.S. 513 (1957), of which the Court later said: "While the State was surely under no obligation to afford such an exemption, we held [in *Speiser*] that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of [constitutionally protected rights] and thereby threatened to produce a result which the State could not command directly." *Sherbert v. Verner,* 374 U.S. 398, 405 (1963). *Piper* makes it clear that Virginia may not exclude nonresidents from its bar, nor may it penalize them *vis-a-vis* equally qualified residents by making them take a bar examination.[1]

[1] In *Goldfarb v. Supreme Court of Virginia,* 766 F.2d 859 (4th Cir. 1985), the court of appeals upheld dismissal of a complaint which challenged Rule 1A:1(d)'s full-time practice requirement under the Commerce Clause. The court reasoned that if Virginia could make everyone take a bar examination, it was free to waive that requirement for some people, but not others, and the court brushed aside without explanation the plaintiff's argument that the full-time practice rule

Virginia also relies (at 7-8) on *Frazier v. Heebe,* 107 S. Ct. 2607 (1987), which invalidated a residence/office requirement for admission to a federal district court bar. Ignoring the outcome of that case, appellants seize upon the Court's observation that the nonresidents being excluded there had "passed the Louisiana bar exam" and suggest that this fact was crucial to the result. *Id.* at 2612. Although the rule at issue in *Frazier* required members of the district court bar to be members of the Louisiana state bar, and there was no procedure for being admitted to the Louisiana bar on motion, nothing in *Frazier* suggests that the analysis or result would have been different if lawyers could have been admitted to the Louisiana bar on motion.

If anything, *Frazier* bolsters the case for summary affirmance, as the Court held that in-state residence and office requirements were "unnecessary and irrational" ways of achieving the district court's goal of a competent and responsible bar. *Id.* at 2612. Since those are the same goals which the residence requirement is said to advance here, and since the Court has already rejected these arguments in *Piper* and *Frazier,* there is no need to give them plenary consideration once again.

---

was an unconstitutional condition. This Court denied certiorari, with Justice White and Justice Blackmun voting to hear the case. 106 S. Ct. 862 (1986).

Here, Virginia defends the residence requirement as a way of assuring compliance with its full-time practice rule. Should the Court note probable jurisdiction, appellee will argue that the residence requirement is an unconstitutional condition under *Speiser.* That contention, if upheld, would also undermine the validity of the full-time practice rule (which we note is the most restrictive requirement imposed by any state admitting attorneys on motion). *Compare, e.g.,* Ill. S. Ct. R. 705; Ind. Rules for Admission to the Bar and the Discipline of Attys., R. 6; Iowa Code Ann. § 610 App., R. 114(a); Ohio S. Ct. Rules for the Gov't of the Bar of Ohio, R. I, § 9(g); R.I.S. Ct. R. 34(d); Wyo. Stat. § 33-5-110.

2. Appellants next argue (at 9-11) that the decision below creates a conflict between the circuits. It does not. The decision is consistent with virtually every lower court opinion to address this issue.[2] The only contrary opinion — and there is really just one — is both wrong on the law and factually distinguishable.

In *Sestric v. Clark,* 765 F.2d 655 (7th Cir. 1985), *cert. denied,* 106 S. Ct. 862 (1986), the court held that the Privileges and Immunities Clause does not apply to an Illinois court rule which limited admission on motion to Illinois residents, adding in *dictum* that even if the Clause did apply, the restriction was a valid way to promote lawyer competence. *Sestric* was relied on in the other case which Virginia cites, a district court opinion upholding a Wyoming law which limited motion admissions to lawyers who have lived in the state for six months. *Sommermeyer v. Supreme Court of Wyoming,* 659 F. Supp. 207 (D. Wyo. 1987), *appeal pending,* No. 87-1811 (10th Cir.) (awaiting argument).

Sestric assumed that Illinois' rule benefited only "new" Illinois residents, while denying motion admission to "old" Illinois residents and all nonresidents, and it reasoned that since the burden fell on both residents and nonresidents alike, the Privileges and Immunities Clause did not apply. 765 F.2d at 659. Since Rule 1A:1 does not limit motion admissions to "new" Virginia residents, and since the discriminatory effect of this Rule is aimed at nonresidents, there

---

[2] *See In re Jadd,* 391 Mass. 227, 237, 461 N.E.2d 760, 765-66 (1984); *Gordon v. Committee on Character and Fitness,* 48 N.Y.2d 266, 273, 397 N.E.2d 1309, 1313, 422 N.Y.S.2d 641, 645 (1979) *(dictum); see also Stanley v. Missouri State Board of Law Examiners,* 616 F. Supp. 142 (W.D. Mo. 1985); *Solomon v. Emanuelson,* 586 F. Supp. 280, 285 (D. Conn. 1984); *Stalland v. South Dakota Board of Bar Examiners,* 530 F. Supp. 155 (D.S.D. 1982).

is no conflict between this case and *Sestric*. Moreover, this Court has held that the Privileges and Immunities Clause is not limited to laws that discriminate solely against nonresidents, but applies to state laws favoring one category of residents over both other residents and nonresidents. *See United Building & Construction Trades Council v. Mayor & Council of the City of Camden,* 465 U.S. 208, 218 (1984). Thus, even if *Sestric* were not distinguishable, it is plainly in error, and there is no reason to grant review based on an asserted conflict with it.

Nor is there a need for plenary review of the merits. Virginia argues that residence helps assure lawyer competence and a willingness to honor professional commitments, but those claims were laid to rest in *Piper* and *Frazier* and need not be revisited here. If the Court is concerned that the outcome here differs from that in *Sestric* – and that seems to be the crux of appellants' final argument (J.S. at 11-14) – there is a further distinction which the court of appeals considered pivotal (J.S. App. A10-A11) and which requires this case to be affirmed summarily.

Both Illinois and Virginia expressed concern that nonresident motion admittees would be less committed to practicing law in their states than residents, particularly if they divided their practice between their home state and the state where they were admitted on motion. After *Piper* and *Frazier,* there are serious questions about whether the multi-state practice of law is the sort of "evil" which the Constitution allows a state to restrict in this manner. *See* note 1, *supra.* In any event, Virginia, unlike Illinois, has addressed that concern by requiring motion applicants "to practice full time as a member of the Virginia Bar" for as long as they wish to remain a member in good standing of the Virginia Bar. Va. S. Ct. R. 1A:1(d), 1A:3. Ms. Friedman has made that commitment to full-time practice here,

while the lawyer in *Sestric* wanted to practice in both Missouri and Illinois and could have done so had the Illinois residency requirement been struck down. 765 F.2d at 660.

The court of appeals here thought this point was crucial: "The Seventh Circuit reasoned that nonresident applicants to the state bar were undoubtedly proposing to supplement their existing practice, but Virginia's rule requiring full-time practice within the state prevents the drawing of that inference here," for it asks motion applicants to "give up their previous practice" *and* to live in Virginia, thus placing "a significant burden on nonresident citizens without, as distinguished from Illinois, offering them the benefit of an interstate practice" (J.S. App. A11).

When viewed in conjunction with this full-time practice rule, Virginia's residency requirement is indeed redundant. While appellants argue that living in Virginia helps assure that motion applicants will honor their commitment to full-time practice, the court of appeals correctly found it unlikely that "a resident will be more truthful than a nonresident in stating his intention, or in carrying out his commitment, to practice full-time in Virginia" (J.S. App. A13). Nor does the decision below undermine enforcement of that rule. The court of appeals noted that "Virginia has established no enforcement machinery to monitor compliance" and add 1 that compliance could be assured through a "less drastic alternative," such as requiring motion admittees to certify annually that they have practiced full-time in Virginia over the past year (J.S. App. A13, A14).

Finally, we note that Virginia's full-time practice rule is unique among the seven states which require residency of motion applicants. *See* note 1, *supra.* Indiana, Ohio and Wyoming simply require motion applicants to be state re-

sidents, while Iowa gives them the option of living in the state or showing a bona fide intention to open a law office there. Illinois demands an "active[ ] and continuous[ ]" in-state practice, while Rhode Island requires motion applicants to make law practice in that state their "principal occupation." Only Virginia asks motion applicants to commit themselves to "full-time" practice. Thus, a ruling on the merits will be of limited precedential value, and for that reason also, summary affirmance is warranted.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

Cornish F. Hitchcock
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Appellee

Of Counsel:
John J. McLaughlin
313 Park Avenue, Suite 400
Falls Church, Va. 22046
(703) 237-0125

October 1987